



Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Maritime Safety Agency regarding the recruitment procedure of Seconded national experts

Brussels, 20 November 2007 (Case 2007-567)

1. Proceedings

On 17 September 2007, the EDPS received a notification for prior checking under Article 27 (3) of Regulation (EC) No 45/2001 ("the Regulation") from the Data Protection Officer (DPO) of the European Maritime Safety Agency (EMSA). The data processing operation relates to the recruitment procedure of Seconded National Experts. Annexed to the notification were the "Guidelines on recruitment of seconded national experts" and the Decision of the Administrative Board of 20 March 2007 on "Rules applicable to Detached National Experts on Secondment to the European Maritime Safety Agency".

The procedure was suspended on 14 November 2007 for seven days to allow for comments by the DPO on the draft opinion. The DPO sent her comments on 15 November 2007.

2. Examination of the matter

The facts

The purpose of the processing operation is to recruit Seconded National Experts (SNE) to enable the Agency to benefit from the high level of their professional knowledge and experience and to share and exchange knowledge and expertise between EMSA and the EU Member States or from members of the European Economic Area (EEA). Recruitment shall ensure that the SNE to EMSA have the highest standard of ability, efficiency and integrity.

A Decision of the Administrative Board of the Agency on rules applicable to Detached National Experts on Secondment to EMSA has been adopted on 20 March 2007. Guidelines adopted on July 2005 describe the procedure to be followed to recruit SNEs.

The persons concerned are the applicants for the SNE vacancy. Candidates are nationals of the Member States of the Communities and of Norway or Iceland, or of a third State in case the executive Director grants derogation from the nationality requirement.

The data processed are the following : surname, first name, telephone, fax, e-mail, address, nationality, date of birth, gender, work experience, education and training, mother tongue, knowledge of other languages, personal skills and competences, other skills and competences, driving licence. The data are collected through the European CV, <http://europass.cedefop.europa.eu/europass/home/vernav/Europasss+Documents/Europass+CV/navigate.action>. A declaration of honour, a motivation letter, copies of certificates

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and employment transcripts (for those coming to the interviews), the Legal Entity and Financial Identity Forms (LEF) (for those invited to the interview having the right to be reimbursed) are also processed.

Procedure:

a) Publication of the vacancy

The vacancy notice specifies the conditions of the secondment, the unit to which the position is assigned to, the functions and duties that are to be performed by the SNE, the requirements (education, professional experience, knowledge of a particular field, etc...), the language skill required, the deadline for the submission and the procedure to be followed for sending an application. A letter containing the vacancy and the rules is sent to the Permanent Representations or Missions to EU and, at the same time, the vacancy is published in the EMSA website. From September 2007, the following disclaimer on personal data will be always added to the general text in each call for applications: *Any personal data provided by the Applicant shall be processed pursuant to Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movements of such data. It shall be processed solely for the purposes of the recruitment exercise. The Applicant shall have the right of access to his/her personal data and the right to rectify any such data that is inaccurate or incomplete. Should the Applicant have any queries concerning the processing of his/her personal data, (s)he shall address them to the delegated controller of the data, Head of Human Resources section.*

b) Pre-selection Stage

A Human Resources Sector within the Resources Unit is responsible for receiving the applications and registering them. In order to be considered as valid, applications must be received via the Permanent Representations. No later than three weeks after the deadline, the HR Sector will provide the members of the Selection Board with an initial screening table and the applications. The screening table contains the elements against which the applications are to be evaluated.

c) The Selection Board

The Appointing Authority (AA) nominates a Selection Board (SB) for each selection procedure. The SB is composed of at least three members. The members act in an independent and impartial way. The members respect the confidentiality of the procedure.

A coordination meeting is set up. After the first analysis of all the applications, the SB draws up a list of the most suitable candidates to be interviewed and sets up an evaluation grid. The SB also agrees on the structure of the interview, the fields to be covered and, if deemed necessary the content and structure of a specific written test. All decisions and deliberations of the SB are motivated; minutes of the meeting are drafted and signed by all the members of the SB.

d) Selection procedure

All listed candidates are interviewed by the SB.

Following the interviews, the SB meets to assess each listed candidates and draws up conclusions. The evaluation grids are completed and points awarded to each candidate. The

SB then draws up a list of suitable candidates, if any, to be presented to the AA. If the SB does not reach a consensus on candidates to be short-listed, an explicative note is added to the list.

On the final short-list, the candidates are mentioned in order of merit. The AA may decide to set up another interview with the short-listed candidates or if he so considers to invite a candidate that has not been invited to the interviews by the SB. The AA decides to which applicant is offered the possibility of secondment. Once this decision has been taken, an exchange of letters starts with the Permanent Representation in order to arrange the secondment.

Once the final decision has been taken by the AA, all applicants are informed of the outcome of their application.

The original file is kept by the HR Sector. EMSA being a new Agency (started its activities on 2003), for the time being all the recruitment procedure exercises have been kept. However, it is EMSA's intention to set a time limit. Before taking any decision on this matter, the Agency would like to see the results of the Working group on Time Limits and Blocking.

e) The secretariat to the SB

The secretariat tasks are carried out by a member of the Resources Unit. The secretariat will assist the SB and may, on request of the SB's chairman, participate in the deliberations of the SB without having the right to vote. The secretariat is subject to the duty of confidentiality and impartiality.

Other aspects of the processing:

Human Resources ask the applicants to inform EMSA about any change on his data, such as address, etc. In relation to any other requests, if the data subject requests the controller/ delegated controller orally, by email or by letter to exert his/her rights, the controller will facilitate the applicant the exercise of rights.

The paper documents are kept in files in closed closets in the closed HR storage room to which there are only two keys: one is kept by the Head of section Human Resources and another one by the secretary of Unit A who will only give it to the staff of the Human Resources section who are authorised to access it. Files that are electronic (like copies of the email correspondence with applicants, invitations to interviews, etc.) are stored in drive P where the access to relevant folders is restricted only to the Head of section Human Resources and those the staff of the Human Resources section who are authorised to access relevant files and procedures.

3. Legal aspects

3.1. Prior checking

Regulation (EC) 45/2001 of the European Parliament and of the Council on the protection of personal data by Community institutions and bodies and on the free movement of such data (hereinafter Regulation 45/2001) applies to the processing of personal data by Community institutions and bodies.

Personal data are defined as any information relating to an identified or identifiable natural person. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. The SNE recruitment procedure processes the data referred to above related to applicants for a post. The data therefore qualify as personal data according to Article 2(a) of Regulation 45/2001.

The processing of personal data is carried out by a Community institution in activities which fall within the scope of Community law.

Regulation 45/2001 shall apply to the processing of personal data wholly or partly by automatic means and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system. In this case the processing is carried out both manually and automatically. When personal data are processed manually, they are stored in a structured paper filing system.

Regulation 45/2001 therefore applies.

Article 27(1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all "processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes". Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes Article 27(2)(b) "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency or conduct*".

The recruitment of SNEs evaluates personal aspects of the candidates in order to assess their competences as future SNE. Therefore the recruitment of SNEs falls to be prior checked.

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case however the processing operation has already been established. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received on 17 September 2007. According to Article 27(4) the present opinion must be delivered within a period of two months, which is no later than 19 November 2007. The procedure was suspended on 14 November 2007 for seven days to allow for comments by the DPO on the draft opinion. The DPO sent her comments on 15 November 2007. Therefore, the opinion should be issued no later than 20 November 2007.

3.2. Lawfulness of the processing

Article 5 of Regulation 45/2001 provides criteria for making processing of personal data legitimate. One of the criteria provided in Article 5(a) is that the "processing is necessary for performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof".

The Decision of the Administrative board on 20 March 2007 - Rules applicable to detached national experts on secondment to the European Maritime Safety Agency - provides the legal basis for the recruitment of SNEs. The Guidelines on recruitment of Seconded National Expert governs the role of the Selection Board.

The EDPS is convinced that the processing is necessary for performance of a task carried out in the public interest on the basis of the Decision of the Administrative board and is therefore legitimate under Article 5(a) of Regulation 45/2001.

3.3. Data Quality

According to Article 4(1)(c) of Regulation 45/2001 "personal data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed". After careful examination, the EDPS is of the opinion that the data listed in the notification and collected from the data subject for the purposes of the recruitment of SNEs comply with the criteria set out in Article 4(1)(c).

Article 4(1)(d) provides that personal data must be "accurate and, where necessary, kept up to date". The system itself ensures that the data are accurate and kept up to date as much of the personal data supplied during the recruitment process is provided by the data subject and as Human Resources asks the applicants to inform EMSA about any change on his data. Moreover, the use of a screening table and an evaluation grid makes the data as accurate and objective as possible. The data subjects will be made aware that they have a general right of access and rectification to personal data. This also makes it possible to ensure that the data are accurate and kept up to date.

Article 4(1)(a) also provides that personal data must be "processed fairly and lawfully". Lawfulness has already been discussed (see point 3.2 and fairness will be dealt with in relation to information provided to data subjects (see point 3.9).

3.4. Conservation of data/ Data retention

Article 4(e) of Regulation 45/2001 states that personal data must be "kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed".

The original file is kept by the HR Sector. EMSA being a new Agency (started its activities on 2003), for the time being all the recruitment procedure exercises have been kept. However, it is EMSA's intention to set a time limit. Before taking any decision on this matter, the Agency would like to see the results of the working group on time limits and blocking.

As for the conservation of data, the EDPS would like to raise the attention on the differences of retention period that should be implemented for the candidates who have not been recruited and those who have been recruited. Concerning the candidates who have not been recruited, the retention period should derive from the length of time during which: (i) a complaint may be brought to the European Ombudsman or to the EDPS, (ii) an appeal may be lodged before the Court of Justice, (iii) auditing services may need to consult recruitment files in the frame of Article 49 of the Implementing Rules of the general Financial Regulation, etc. Concerning the candidates who have been recruited, EMSA includes the relevant document in the personal file of the data subject and therefore the retention period policies of the personal file apply. The EDPS reminds EMSA that the personal file should also have a retention time limit.

Without prejudice of the general conclusions of the working group on time limits and blocking, the specific criteria described above should be taken into account.

3.5. Compatible use / Change of purpose

Article 4(1)(b) of Regulation 45/2001 provides that personal data must be "collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes".

Data collected during the SNE recruitment procedure may be used for various reasons (for payment of allowances and expenses to SNE for instance) and are transferred into the personal file. The EDPS is satisfied that these various purposes are compatible with the purposes for which the personal data are obtained; the recruitment is a part of the human resources management, and is thus in accordance with Article 4(1)(b).

3.6. Transfer of data

Article 7(1) of Regulation 45/2001 states that "personal data shall only be transferred to other Community Institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient".

During SNE recruitment, data might be transferred to the members of the Selection Board, the AIPN, to the secretariat to the SB and to the European Ombudsman in the event of a complaint about the process and to the Court in case of appeal.

The EDPS is satisfied that the personal data transferred during and after the recruitment are necessary for the legitimate performance of tasks covered by the recipients in each case and is thus in accordance with Article 7(1).

Article 7(3) states that "the recipient shall process the personal data only for the purposes for which they are transmitted". The EDPS understands that the purposes for which the various recipients receive the data are laid out in the "Guidelines on recruitment of Seconded National Experts". However, it would be good practice to ensure that the recipients are reminded when they receive the personal data of candidates that they should not use the data for any further purposes beyond that of SNE recruitment.

Article 8 states that "(...) personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC, if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority (...)".

The EDPS is satisfied that the personal data transferred during and after SNE recruitment to Permanent Representations and Missions to EU are necessary for the performance of a task subject to the exercise of public authority and are thus in accordance with Article 8(a).

In case the executive Director grants derogation from the nationality requirement, EMSA may hire a SNE from a third Member State. Under Article 9(1) of Regulation (EC) No 45/2001, personal data shall only be transferred to recipients, other than Community institutions and bodies, which are not subject to national law adopted pursuant to Directive 95/46/EC, if an adequate level of protection is ensured in the country of the recipient or within the recipient international organisation and the data are transferred solely to allow tasks covered by the competence of the controller to be carried out.

By way of derogation from paragraph 1, Article 9(6)(b) authorises the institution to transfer data where the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken in response to the data subject's request. Transfers to third countries can be carried out if an adequate level of protection is ensured (Article 9(1)) and, given that they are special transfers, in the context of the abovementioned derogation (Article 9(6)(b)).

3.7. Right of access and rectification

Article 13 of Regulation 45/2001 provides a right of access to personal data being processed. Article 14 provides a right to rectification without delay of inaccurate or incomplete data.

The future call for application for SNE will state that applicants shall have the right of access to his/her personal data and the right to rectify any such data that is inaccurate or incomplete.

As to the right of access of the data subject, it includes all his/her personal data whatever their origin (CV, evaluation grid, etc) except the comparative data. The individual opinion of the SB must also be protected and the data subject may only have access to aggregated data which do not disclose individual opinion. Indeed, the proceedings of the SB are secret.

The EDPS is of the opinion that the rights of the data subject are respected in the processing that occurs as part of the recruitment of SNE provided that the comments made above are taken into account.

3.8. Information to the data subject

Article 11 of Regulation 45/2001 provides for certain information to be supplied where the data have been obtained from the data subject. Article 12 provides for certain information to be supplied where the data have not been obtained from the data subject. During the recruitment of SNEs, personal data are obtained directly from the data subject on the European CV form and from the SB in the evaluation of the applicants. Thus Articles 11 and 12 will both apply to the procedure.

The applicant will be given information through statements on the call for application. The information provided to the applicant includes: the identity of the controller; the purpose for which the data are intended and the right of access and rectification to his/her personal data. The EDPS is of the opinion that the categories of recipients of the data and information on how false statements or omissions may affect the application should be added to the statement as they are part of the requisites of Articles 11 and 12.

In addition, the provision of further information such as the right of recourse to the EDPS or the time periods for the retention of personal data are only required insofar as it is necessary to guarantee fair processing in respect of the data subject. In this case candidates would not necessarily be aware of the existence of the EDPS and would need to be kept informed about how long their personal data may be retained after their contract as secondment comes to an end. The EDPS recommends that the call for application is amended to include further information that is required on the time limits for retaining the data (once it is fixed by EMSA) and the right of recourse to the EDPS.

The EDPS recommends EMSA to post the statement on the call for application as soon as possible.

3.9. Security measures

After careful analysis by the EDPS of the security measures adopted, the EDPS considers that these measures are adequate in the light of Article 22 of Regulation (EC) 45/2001.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided the considerations are fully taken into account:

- The conservation periods established by EMSA should take into account the EDPS remarks.
- It would be good practice to ensure that recipients are reminded when they receive the personal data of candidates that they should not use the data for any further purposes beyond that of SNE recruitment.
- The categories of recipients of the data and information on how false statements or omissions may affect the application should be added to the statement as they are part of the requisites of Articles 11 and 12.
- The call for application should be amended to include further information that is required on the time limits for retaining the data (once it is fixed by EMSA) and the right of recourse to the EDPS.

Done at Brussels, 20 November 2007

Peter HUSTINX
European Data Protection Supervisor